87-624

No. .....

Supreme Court, U.S.
FILED
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CLERK

In The
Supreme Court of the United States
October Term, 1987

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Petitioner,

v.

SECRETARY OF TRANSPORTATION, COMMISSIONER OF THE STATE POLICE, ATTORNEY GENERAL, AND GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN H. LEDERER
Counsel of Record
JOHN DUNCAN VARDA
DEWITT, PORTER, HUGGETT, SCHUMACHER & MORGAN, S.C.
121 S. Pinckney St.
Madison, Wisconsin 53703
(608) 255-8891

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43 pp

QUESTION PRESENTED

Does a Circuit Court of Appeals have jurisdiction to hear an appeal when the notice of appeal was filed after the time period expired because of an error by counsel?

LIST OF PARTIES

The Petitioner is Consolidated Freightways Corporation of Delaware who was the plaintiff in the trial court.

The Respondents, various officials of the Commonwealth of Pennsylvania charged with administering and enforcing laws of the Commonwealth governing vehicles, were the defendants at trial. The officials were sued in both their individual and official capacities. However, the claims against them in their individual capacities have been dropped.[1] Accordingly, under Sup. Ct. Rule 40.4 this Petition uses the official titles in the caption. At the time of trial, the following persons held those positions:

Thomas D. Larson, Secretary of Transportation

Jay Cochran, Jr., Commissioner of the Pa. State Police

Leroy S. Zimmerman, Attorney General

Hon. Richard Thornburgh, Governor

At the present time the positions are held by the following individuals:

Howard Yerusalim, Secretary of Transportation

Ronald M. Sharpe, Commissioner of the Pennsylvania State Police (Acting)

Leroy S. Zimmerman, Attorney General

Hon. Robert P. Casey, Governor

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[1]*Consolidated Freightways v. Larson, et al.*, 647 F. Supp. 1479, n.1, (M.D. Pa. 1986).

RULE 28.1 LIST OF RELATED CORPORATIONS

Consolidated Freightways, Inc.
Consolidated Freightways Corporation of Delaware
Consolidadora de Fletes Mexico, S.A. de C.V.
KAM Container Line Australia Pty. Limited
Orient Consolidation Service, Inc.
CF AirFreight Pty. Limited
Centron Ltd.

All other related companies are either wholly owned subsidiaries of Consolidated Freightways, Inc. or of its subsidiaries or have limited shares closely held by others under requirements of foreign law.

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In The

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October Term, 1987

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE,

Petitioner,

v.

SECRETARY OF TRANSPORTATION, COMMISSIONER OF THE STATE POLICE, ATTORNEY GENERAL, AND GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Consolidated Freightways Corporation of Delaware, respectfully prays that a writ of certiorari be issued to review the order and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on August 28, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reprinted in the appendix at p. 1a, *infra*.

The opinion of the United States District Court for the Middle District of Pennsylvania is also reproduced in the appendix at p. 15a, *infra*. The original opinion of the District Court on the case-in-chief is reported at 647 F. Supp. 1479 (M.D. Pa. 1986).

JURISDICTION

This petition seeks review of a decision of the Third Circuit dated August 28, 1987, reversing the District Court's determination that notice of appeal in this matter was untimely filed, and determining that the Court of Appeals has jurisdiction to hear a late filed appeal.

No petition for rehearing before the Third Circuit was sought. The Third Circuit Court of Appeals entered an order under Fed. R. App. P. 41(b) staying its mandate to allow this Petition to be filed.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 2072:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, plead-

ings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, . . .

* * *

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

28 U.S.C. § 2107:

"Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

Fed. R. App. P. 4(a):

"Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may

be filed by any party within 60 days after such entry. . . .

* * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later."

———o———

STATEMENT OF THE CASE

Petitioner, an interstate motor carrier, sued respondents, alleging that Pennsylvania's statutes and the administrative practice under those statutes violated the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2311, *et seq.*, by denying reasonable access to and from the Interstate Highway system for vehicles covered by the Act. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1332 and 2201-2202. After extensive evidentiary depositions, a two week trial, and the incorporation in the record of a prior five week trial, the District Court for the Middle District of Pennsylvania entered judgment for the plaintiff. The judgment, entered on November 19, 1986, declared certain parts of the Pennsylvania statutes to be in conflict with the federal act and enjoined defendants

from denying reasonable access to vehicles covered by the Act.

Respondents prepared a notice of appeal on December 18, 1986, the day before the last day on which a notice of appeal could be filed. Through a mistake by counsel or those working for him, the notice of appeal was miscaptioned and was consequently not hand delivered to the District Court for the Middle District of Pennsylvania on the day intended, but was instead mailed to the District Court for the Eastern District of Pennsylvania, where it arrived after the deadline. The clerk's office of that court forwarded it to the Middle District, where it arrived on December 24, 1986, five days after the deadline.

Respondent moved the District Court for an order under Fed. R. App. P. 4(a)(5), allowing the late filing of the notice on the basis of "excusable neglect." The District Court denied the motion on the basis of *State of Oregon v. Champion International Corporation,* 680 F.2d 1300 (9th Cir. 1982), which holds that a mistake of counsel does not constitute "excusable neglect" within the meaning of Rule 4(a)(5).

Respondent then appealed the denial to the Third Circuit Court of Appeals. A three-judge panel rejected the Ninth Circuit precedent and reversed the trial court. The Third Circuit held that it would have jurisdiction of a late filed appeal, if the appeal met a five part test that convinced the court that the deadline was missed because counsel inadvertently erred.

Petitioner did not seek a rehearing, but did request and obtain a stay of the mandate to allow filing of this petition.

———o———

REASONS FOR GRANTING THE WRIT

This case does not involve a momentous public issue. The issue is one of judicial administration. However, the issue is not merely one of convenience or efficiency. It is jurisdictional, and determines whether cases, including those involving momentous public issues, will be reviewed. The issue should be resolved uniformly across the federal system.

A lawyer who files an appeal late because of a mistake in the First or Ninth Circuits will have his case ended. A lawyer who files late in the Third, and possibly the Fourth, Circuits may be excused, and the appeal heard. The Circuits have differing definitions of when a judgment is final and differing definitions of appellate jurisdiction.[2]

This Court should hear and determine this issue because of the conflict in the Circuits, because it affects the jurisdiction of the Circuit Courts, because it involves the uniform application of the Federal Rules of Appellate Procedure, and because it involves the standards to which the federal bar will be held.

Conflict in the Circuits

By statute, unless the United States is a party, an appeal to the Circuit Court of Appeals must be filed within 30 days by filing in the District Court a notice of appeal, 28 U.S.C. § 2107. This statute has been modified by the

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[2]Cases arising under the "excusable neglect" provision are embarrassingly large in number, particularly when one considers that most are probably not published. Some of the published cases are collected in 9 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice Rules ¶ 204.13 [1.-3] (2d.Ed. 1985), and, 1987 Supplement ¶ 204.13 [1.-3].

Federal Rules of Appellate Procedure to extend the basis for extensions beyond a failure to learn of the entry of judgment. Rule 4(a)(5) allows a prospective appellant to file a motion in the District Court not more than 30 days after the due date to extend the time for filing "upon a showing of excusable neglect or good cause."[3]

In the First and Ninth Circuits, "excusable neglect" exists only when an intervening factor thwarts the attorney who has done correctly what a reasonable, diligent, attorney would have done. Thus, for instance, an attorney who mailed a notice of appeal seven days before the deadline, but had it delivered after the deadline by the Post Office, could be excused. The attorney's neglect would consist in not having checked delivery prior to the due date, but it might be excused because a reasonable attorney would rely on Post Office delivery in seven days.

When, however, the attorney fails to do correctly what a reasonable attorney would have done, as for example by failing to put a stamp on the letter, the neglect is not excusable:

> "A mistake made by an attorney or his staff is not, except in unusual or extraordinary circumstances not present here, such excusable neglect as to invoke the rule." *Airline Pilots in the Service of Executive Airlines, Inc., Counsel Number 2, Union of Professional Airmen v. Executive Airlines, Inc., et al.,* 569 F.2d 1174, 1175 (1st Cir. 1978), adopted in *Alaska Limestone Corp. v. Hodel,* 799 F.2d 1409 (9th Cir. 1986).

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[3]"Good cause," added to the statutory language by the 1979 Amendment, is limited to a Motion for Extension filed within the original thirty day period. Fed. R. App. P. 4(a)(5), 1979 Advisory Committee Note. Thus, "excusable neglect" is the usually pertinent phrase in cases of attorney error.

Thus when an attorney in the Ninth Circuit inadvertently mailed his notice of appeal to the wrong court, he was not excused:

> "The standard for determining excusable neglect is 'a "strict" one.' Selph v. Council of Los Angeles, 593 F.2d 881, 883 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed.R.Civ.P. 73, the predecessor of Fed. R. App. P. 4(a)). It was intended to apply only to 'extraordinary cases where injustice would otherwise result.' In re Estate of Butler's Tire & Battery Co., 592 F.2d 1028, 1034 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed.R.Civ.P. 73). Inadvertence or mistake of counsel does not constitute excusable neglect. Sprout v. Farmers Insurance Exchange, 681 F.2d 587 (9th Cir. 1982); Butler's Tire, 592 F.2d at 1034. See In re Donnell, 639 F.2d 535, 539 (9th Cir. 1981). Nor does clerical error by counsel's staff. Airline Pilots v. Executive Airlines, Inc., 569 F.2d 1174 (1st Cir. 1978) (per curiam). See Selph, 593 F.2d at 883. Compare Marshall v. Lancarte, 632 F.2d 1196, 1197 (5th Cir. 1980). Extending the excusable neglect exception to clerical errors of counsel or counsel's staff would be inconsistent with the Advisory Committee's intent to limit the exception to extraordinary cases and would thwart the Rule's purpose of promoting finality of judgments. See Selph, 593 F.2d at 882; Spound v. Mohasco Industries, Inc., 534 F.2d 404, 411 (1st Cir. 1976); Pasquale v. Finch, 418 F.2d 627, 630 (1st Cir. 1969)." *State of Oregon v. Champion Int. Corp.*, 680 F.2d 1300, 1301 (1982).

In this case, the Third Circuit followed a different rule, expressly rejecting the Ninth Circuit case. Though the Court outlined a five part test, its rule of decision can be simplified: If an attorney can prove that he knew and intended to do what a reasonable, diligent, attorney would

have done, but by error or inadvertence fails to do what he intended, he must be excused.[4]

The conflict is very direct. The facts of this case are nearly identical to those of the *Oregon* case.

Though the Fourth Circuit has not ruled directly on this issue, its cases suggest a tolerance of attorney error similar to the Third Circuit's. The Fourth Circuit has allowed an extension where an attorney's internal office forwarding system went awry, *Marshall v. Truland Corp.*, (Unpublished Opinion) 24 F.R. Serv. 2d 1443 (4th Cir. 1978), where a failure of communication among attorneys resulted in a failure to file, *Babich v. Clower,* 528 F.2d 293 (4th Cir. 1975), or where attorneys have failed to obtain next business day delivery of mail, *semble, Doctor v. Seaboard Coast Line Railroad Company,* 540 F.2d 699 (4th Cir. 1976); *Evans v. Jones,* 366 F.2d 772 (4th Cir. 1966).

Thus, in the First and Ninth Circuits, the late filing of a notice of appeal because of an inadvertent mistake by the attorney will deprive the Court of Appeals of jurisdiction. In the Third, and possibly the Fourth Circuit, the Court of Appeals will have jurisdiction.

This Court has long recognized the importance of reconciling conflicts among the Circuits. It is the only place that such a conflict can be resolved.

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[4]The Circuit Court's five part test is in the appendix at pp. 8a-9a. The fifth element goes to the inadvertence of the error. The other four elements go to whether the attorney intended, and can prove that he intended, to do the right thing.

The Matters Affected by the Third Circuit Decision are Important

Determinations of jurisdiction are determinations of the power of the courts, and, *a priori,* are important. In the case of the federal courts the importance is not subtle. At the extreme, irreconcilable conflicts between governments in our federal system are determined by the federal courts or by civil war. Federal jurisdiction determines how and under what circumstances the federal courts will act as arbiter of these and other less important conflicts.

Jurisdiction, however, is not determined solely by balances of competing policies of the federal system. It is also determined by the plain hum drum of procedure.

Procedural rules are, of course, indispensable. There must be a deadline for appeals. Judgments must become final at a clearly determinable time. The rules that determine those things, however, should be clear, definite, and uniform. Otherwise, the procedural rules become haphazard elements of chance which determine the result, making irrelevant the real and important considerations that should determine the case.

That is what has happened here. This case would be determined differently, were it filed in a different area of the country with a different definition of excusable neglect.[5]

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[5]This Court has previously granted certiorari to ensure uniform application of Fed. R. App. P. 4(a), *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56 (1982) (*per curiam,* reversing the Third Circuit's assertion of jurisdiction when the notice of appeal was premature).

Supervision of the Federal Bar

The uniform Federal Rules of Civil Procedure have gradually resulted in the creation of a federal bar, *Frazier v. Heebe,* 482 U.S. —, 96 L.Ed.2d 557, 566, n.7. The standards to which the bar is held are important in determining how well the judicial process works. Lawyers, perhaps even more than judges, affect the quality of justice.

This case presents a significant difference in the Circuits' underlying view of what the standards of the Bar should be. In the First and Ninth Circuits, the criteria is the lawyer's performance. The lawyer must actually do the proper thing. In the Third Circuit, the criterion is not the performance, but the intent. What counsel intended to do is the test. The road to appeal in the Third Circuit is serviceable if paved with good intentions.

Those differing views should not be permitted. They cause loss of a uniform national standard of conduct. This Court alone possesses the power to resolve such differences and set a uniform standard for the conduct of attorneys. It should do so.

This Court's Rules on Finality Should Not Bar Granting the Petition

In general, though this Court has the power to hear non-final cases arising in the federal courts, 28 U.S.C. § 1254, it has taken the position that it will not do so. It has, however, recognized that even where finality is jurisdictional under 28 U.S.C. § 1257, application is governed by looking to the underlying principles to be preserved, *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546 (1949); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

This case has an unusual procedural posture. The jurisdictional issue raised by this petition has been finally determined by the District Court, appealed, and finally determined by the Circuit Court. It will have no further consideration below this Court. Moreover, the finality of the underlying case is resolved by the jurisdictional issue's determination. If the Circuit Court has no jurisdiction, then the entire proceeding is finished.

The basic factors underlying the rule on finality are those of judicial economy. Appeals should not be heard piecemeal, nor should they be heard without a full development of the facts, or without the advantage of a reasoned lower court decision. At the same time, the parties should not be required to waste their money and the judicial resources in possibly futile proceedings.

Four factors strengthen the policy reasons for granting certiorari in this case, and lessen the pertinence of those that discourage granting certiorari at this stage. First, the issue presented does not depend on the facts or determination of the case-in-chief. It is an entirely separable issue that has finally been determined by both the trial and appellate courts. Its merit for consideration by this Court is separate from the case-in-chief's. The issue, however, is fundamental to the further conduct of the case below. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *and see, Michael v. United States*, 454 U.S. 950, 951-52 (1981) (White, J., dissenting).

Second, the issue is one of jurisdiction. A claim that the court lacks the power to hear the case inherently changes the nature of the policy considerations.[6] If the claim has arguable merit, a requirement that the Court of disputed jurisdiction first hear the case-in-chief is unlikely to result in judicial economy. Moreover, on a simplistic level, jurisdiction ought be determined before exercised.[7] This Court has previously granted review where the question is one of whether the appellate courts have jurisdiction to hear an appeal, without first requiring review of the case-in-chief. ***DiBella v. United States,*** 369 U.S. 121 (1962); *Carroll v. United States,* 354 U.S. 394 (1957).

Third, the policy considerations surrounding a decision interpreting rules of procedure are different than those involving a decision on substantive matters. This issue does not involve the type of constitutional or legal issue in which the Court should not intervene unless necessary, *Ashwander v. T.V.A.,* 297 U.S. 288 (1936).[8] This

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[6]The unique quality of jurisdiction in judicial policy is illustrated by improper exercise of judisdiction forming the theoretical basis for the extraordinary writs of prohibition and mandamus.

[7]Because the issue is jurisdictional and involves the Supremacy Clause, a requirement that the matter proceed below before consideration by this Court presents a danger of exacerbating federal-state relations. The District Court held state law unconstitutional. Were the Third Circuit to reverse that decision; and then this Court to determine that the Third Circuit lacked jurisdiction, the state statute would be overridden, but the substantive basis for that decision would be discredited.

[8]Indeed, the result of requiring the entire case to be presented together might be the unnecessary and possibly embarrassing, decision of a constitutional issue by the Court of Appeals, *see, supra,* n.7.

case is not one of the balance of constitutional power, but rather one of the administration of the courts. Review will not thrust this Court into possibly unnecessary conflict with governments. Rules of procedure are promulgated in advance of conflicts for the purpose of avoiding unnecessary disputes over mechanics. Special considerations are present when this Court, with statutory administrative responsibility for the rules, 28 U.S.C. § 2072, is presented with a problem of their interpretation, *see, Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

Finally, there is a practical consideration. The issue here is simple and direct. This court has disposed of a similar issue *per curiam, Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). The case-in-chief, however, is messy. It involved exhibiting patterns of administrative action in hundreds of proceedings through computer statistical analyses, illustrating the cumulative practical effects of individual actions by local governments on interstate commerce in Pennsylvania, and extensive expert testimony and exhibits on vehicle characteristics and safety. Much of the testimony was through evidentiary depositions and incorporation of a prior record. The case on appeal would be a large and complicated one. If the Third Circuit erred and has no jurisdiction, the parties and the courts will waste much in consideration of the appeal, particularly in comparison to the straight forward consideration of the rule issued by this Court.

None of these factors alone is normally sufficient, but in combination they suggest that this case is one where the finality rule should not bar review at this stage.

———o———

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court will issue a writ of certiorari to the Third Circuit Court of Appeals.

Respectfully submitted this 18th day of October, 1987.

JOHN H. LEDERER
Counsel of Record
JOHN DUNCAN VARDA
DEWITT, PORTER, HUGGETT,
SCHUMACHER & MORGAN, S.C.
121 S. Pinckney St.
Madison, Wisconsin 53703
(608) 255-8891

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5122

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corp.

Appellee

v.

LARSON, THOMAS D., Individually and in his capacity as Secretary of Trans., Dept. of Transp. Comm. of Penna.; COCHRAN, JAY JR., Individually and in his capacity as Commissioner of the Penna. State Police; ZIMMERMAN, LEROY S., individually and in his capacity as Attorney General of the Comm. of Penn.; THORNBURGH, RICHARD, Individually and in his capacity as Governor of the Comm. of Penna.,

Appellants

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. No. 84-0222)

Argued April 29, 1987

BEFORE: WEIS and STAPLETON,
Circuit Judges
and SAROKIN*, *District Judge*

---

* Honorable H. Lee Sarokin, United States District Court for the District of New Jersey, sitting by designation.

(Opinion filed August 28, 1987)

Leroy S. Zimmerman
Attorney General
John G. Knorr, III (Argued)
Senior Deputy Attorney General
Andrew S. Gordon
Chief Deputy Attorney General
Office of the Attorney General
15th Fl. Strawberry Square
Harrisburg, Pennsylvania
17120

Attorneys for Appellant

Jack M. Stover, Esq.
Shearer, Mette, Evans
& Woodside
P.O. Box 729
Harrisburg, Pennsylvania
17108-0729

John Duncan Varda
John H. Lederer (Argued)
Margaret A. Sattherthwaite
DeWitt, Porter, Huggett,
Schumacher & Morgan, S.C.
P.O. Box 2509
Madison, Wisconsin 53701

Attorneys for Appellee

OPINION OF THE COURT

SAROKIN, *District Judge:*

Appellants, the Pennsylvania Secretary of Transportation *et al.,* represented by the Pennsylvania Office of the Attorney General, sought to appeal from a November 19, 1986 order of the district court enjoining enforcement

of certain provisions of Pennsylvania law held to be inconsistent with, and preempted by, the federal Surface Transportation Assistance Act of 1982, 49, U.S.C. § 2301 *et. seq.*

Pursuant to Federal Rule of Appellate Procedure 4(a)(1), notice of appeal was due to be filed on or before December 19, 1986. On December 18, 1986, one day before the 30 day limit for filing expired, counsel prepared a notice of appeal. The notice properly identified the case, docket number and district judge but erroneously listed the district as Eastern rather than Middle District of Pennsylvania. As a result of this error, the notice was mailed to the Eastern District rather than being hand delivered that day to the Middle District Clerk's Office in Harrisburg, adjacent to the Attorney General's Office.[1]

Notice arrived at the Eastern District on December 22, 1986. Upon detection of the error, the notice was immediately forwarded to the Middle District where it arrived on December 24, 1986, five days after the December 19, 1986 deadline.[2] The appeal was promptly docketed as No. 87-5018.

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1. Counsel for the defendants represents that it is the practice of the Office of the Attorney General to hand carry each day's filings to the Middle District's Clerk's Office in Harrisburg at the end of each business day. See Defendant's Motion to Extend Time for Filing Notice of Appeal, Appendix at 7a-8a. Accordingly, in the normal course of events, the notice of appeal completed on December 18, 1986 would have been filed in the Middle District's Clerk's Office that same day, one day before the deadline.

2. Counsel for plaintiff does not challenge the timeliness of its receipt of the Notice. There is nothing before the court to suggest that plaintiff was not aware of the appeal on or before December 19, 1986.

As the timely filing of an appeal is an issue of jurisdictional import, on January 14, 1987, the Clerk of this court notified counsel of the possible procedural defect resulting from the delay. It is undisputed that counsel for defendants was not aware of the error until this time. Seeking to cure the defect, counsel immediately applied to the district court for a five day extension of time in which to appeal so that the Notice, filed on December 24, 1986, could be deemed timely filed. Pursuant to Federal Rule of Appellate Procedure 4(a)(5), a party who files for an extension of the 30 day appeal period after that period has expired must demonstrate "excusable neglect" in order to receive an extension.

The district court denied plaintiff's application reasoning that a clerical error made by counsel or someone under counsel's control can never constitute "excusable neglect" within the meaning of 4(a)(5). Plaintiff filed this timely appeal, No. 87-5122, from the denial of its application. Proceedings in this appeal were expedited and proceedings in No. 87-5018 were stayed pending a decision here.

As set forth in *Pedereaux v. Doe*, 767 F.2d 50, 51 (3d Cir. 1985), our standard of review is mixed. Review of the district court's interpretation and application of Rule 4(a)(5) is plenary. The court's denial of the requested extension is limited to an abuse of discretion review. Finding that the district erred as a matter of law in its rigid application of 4(a)(5), we now reverse.

II.

The issue before this court is whether the inadvertent misdirection of a notice of appeal, which results in untime-

ly filing, constitutes excusable neglect within the meaning of Federal Rule of Appellate Procedure 4(a)(5).[3]

The district court concluded that conduct under the control of counsel cannot come within the excusable neglect exception. The court began its analysis by recognizing, correctly, that the standard for determining excusable neglect is "a 'strict' one," and that excusable neglect applies only to "extraordinary cases where injustice would otherwise result." *See* Advisory Committee Notes to 1966 amendment to Federal Rule of Civil Procedure 73, the predecessor of Fed.R.App.Proc. 4(a). Believing that counsel's inadvertent misdirection could not constitute an "extraordinary circumstance" sufficient to establish excusable neglect, the district court denied the requested extension.

Relying heavily on the Ninth Circuit's opinion in *State of Oregon v. Champion International Corp.*, 680 F.2d 1300 (9th Cir. 1982), the district court reasoned that "extending the excusable neglect exception to clerical errors of counsel or counsel's staff would be inconsistent with the Advisory Committee's intent to limit the exception to extraordinary cases and would thwart the Rule's purpose of promoting finality of judgments." *Id.* at 1301. In *State*

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3. Fed.R.App.Proc. 4(a)(5) provides that "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by the Rule . . . ." The parties agree that the "good cause" language does not apply here since an extension of time for good cause is available only if the request is made within the original 30 day period for taking the appeal. Any request for extension filed after the original period has run is governed by the excusable neglect standard. Fed.R.App.Proc. 4(a)(5), 1979 Advisory Committee Note.

of Oregon, appellant inadvertently mailed the notice of appeal to the state rather than the federal district court. The error caused the notice to arrive in federal court one day after the filing period. A two judge majority held that this was not excusable neglect. *See also Alaska Limestone Corp. v. Hodel,* 799 F.2d 1409 (9th Cir. 1986) (adopting *State of Oregon's* strict interpretation of Rule 4(a)(5)).

The district court in the instant case interpreted Rule 4(a)(5) to require establishment of a *per se* rule that whenever counsel had, or should have had, "control" over the underlying error, such error could not, as a matter of law, constitute excusable neglect. The court placed much emphasis on the fact that the inadvertent misdirection "occurred within counsel's own office"; concluding that if counsel's inadvertent misdirection were excused, "we are hard pressed to discern a principle that would delineate excusable from inexcusable neglect." *See* Appendix at 23a, 26a. Consistent with the district court's interpretation, only those unavoidable errors which result through no fault of counsel, and are beyond counsel's control, qualify as instances of excusable neglect within the meaning of 4(a)(5). This court cannot agree.

We find it clear from the language of Rule 4(a) itself that the concept of excusable neglect encompasses more than acts, omissions, or events beyond the control of appellant and appellant's counsel. Section 4(a)(1) provides that if a notice of appeal is mistakenly filed in the court of appeals, rather than the district court, the clerk of the court of appeals shall automatically transfer the appeal and it shall be deemed filed on the date it was received by

the circuit court. As eloquently stated by the dissent in *State of Oregon, supra*:

> [t]his example evidences the drafters' intent that de minimis instances of neglect, such as the misaddressing of an envelope, be excused. To hold that mailing a notice of appeal to the [wrong] court is inexcusable although the rules explicitly require an opposite result if notice is mistakenly sent to the court of appeals defies explanation.

State of Oregon, supra, at 1302.[4]

By limiting applicability of the excusable neglect exception to errors beyond counsel's control, the district court ignored Rule 4(a)(5)'s purpose of excusing "neglect." The district court's holding effectively writes the "excusable neglect" standard out of Rule 4(a)(5). Accordingly, this court finds that the district court erred as a matter of law in its interpretation and application of Rule 4(a)(5).

In addition, this court rejects the district court's attempt to establish a *per se* rule against applying excusable neglect to inadvertence of counsel. Rule 4(a)(5)'s excusable neglect standard requires a case-by-case analysis. In order to judiciously apply the standard, a court must, at a minimum, make findings as to the reasons underlying counsel's inadvertence. There is a qualitative distinction

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4. Even if the Notice of Appeal here at issue had been deemed filed on the day of its receipt by the Eastern District, it would still have been three days late. Though application of Rule 4(a)(1)'s reasoning would not have rendered the Notice timely, 4(a)(1)'s underlying purpose, namely to excuse instances of de minimis neglect supports application of the excusable neglect exception in this case.

between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence.

Although every case must be examined on an ad hoc basis and it is impossible to compose an exhaustive list of factors relevant to a determination of whether excusable neglect has occurred, a thoughtful analysis of this issue in a particular context will, at a minimum, require a weighing and balancing of the following factors: (1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure, *Campbell v. Bowlin,* 724 F.2d 484 (5th Cir. 1984) (failure to read rules of procedure not excusable); (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, *Airline Pilots v. Executive Airlines, Inc.,* 569 F.2d 1174 (1st Cir. 1978) (mistake in diarying counsel's calendar not excusible); (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence, *United States v. Commonwealth of Virginia,* 508 F. Supp. 187 (E.D.Va. 1981) (failure to arrange coverage during attorney's vacation which encompassed end of appeal period not excusable); (4) whether the inadvertence reflects a complete lack of diligence, *Reinsurance Co. of American, Inc. v. Administratia,* 808 F.2d 1249 (7th Cir. 1987); or (5) whether the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Applying these factors to the case at bar, the court finds that counsel's error was not the result of professional incompetence; that counsel is not attempting to create a facile excuse by which to extend the time for ap-

peal, indeed counsel gained no advantage by the misdirection; and that the type of human error here involved, though certainly avoidable, is neither readily foreseeable nor capable of anticipation by counsel. This court is satisfied that counsel acted with due diligence even if not perfect diligence in complying with Rule 4(a)(5). The record reflects substantial good faith efforts to comply including recognition of the 30 day limit for filing appeals, completion of the Notice of Appeal within the 30 day limit, and timely service of the Notice upon opposing counsel, such that plaintiffs suffered no prejudice as a result of counsel's error. Moreover, counsel acted expeditiously in seeking to cure the delay, applying for an extension of time immediately upon learning of his error.

This court interprets Rule 4(a)(5) to require a finding of excusable neglect in those instances where the court, after weighing the relevant considerations is satisfied that counsel has exhibited substantial diligence, professional competence and has acted in good faith to conform his or her conduct in accordance with the rule, but as the result of some minor neglect, compliance was not achieved. For these reasons, the court holds that counsel's inadvertent misdirection of the Notice of Appeal is excusable.[5]

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5. Other courts have reached similar conclusions though without an analysis of their reasons. *See e.g.,* Myerson v. Stephenson, 781 F.2d 1036 (4th Cir. 1986) (pro se appellant's misdirection of notice of appeal to the wrong division of the court held "obviously" excusable); Marshall v. Hope Garcia Lancarte, 632 F.2d 1196 (5th Cir. 1980) (though erroneous docket number listed on the notice of appeal was not corrected until the period for appeal expired, court held this "clearly" excusable neglect).

Though this court does not deny that counsel's error could have been detected by careful proofreading, the court recognizes that even the most diligent practitioners are susceptible to such human error. To declare the acts here involved inexcusable sets no standard to guide future conduct by members of the bar. Precisely because such error can escape undetected even in the most carefully run offices, the district court's application of the excusable neglect standard serves little deterrent purpose. Members of the bar do not have to be reminded to address their mail accurately or caption their cases properly. While the district court's application may effectively deter incompetence, or callous disregard for the rules, the susceptibility to human error is not readily capable of regulatory control.

Finally, this court finds that the district court's singular focus upon the need to promote finality of judgments distorted the proper application of Rule 4(a)(5). The interest in finality must be balanced against the need to allow justice to take its course, and not have it thwarted by some minute technical error. *See Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5, 8 (5th Cir. 1970). The finality doctrine and the rules governing timeliness of appeals exist to promote fairness, and to promote prompt notice of appeal thereby avoiding the prejudicial effect of reopening litigation which the opposing party had assumed was closed. The length of the delay and the basis of the delay affect the overall fairness concern. Where as here the delay was minimal, and where the court has determined that the delay was not the result of any bad faith but rather occurred despite counsel's substantially diligent efforts at compli-

ance, the judicial interest in deciding cases on the merits outweighs the interest in finality.

III.

The case at hand is distinguishable from this court's ruling in *Braxton v. HHS*, 817 F.2d 238 (3d Cir. 1987). In *Braxton*, we were asked to decide whether counsel's failure to monitor the service of process by a private process server constituted sufficiently "good cause" under Rule 4(j) to excuse untimely service of a complaint. We concluded that it did not. *Braxton*, 817 F.2d at 242; *see Lovelace v. Acme Markets*, Slip op. No. 86-1690 (3d Cir. May 29, 1987) (following the rule of *Braxton*).

Although counsel in the case before us could be said to have failed to monitor whoever caused the wrong caption to be placed on the notice of appeal, the situation in *Braxton* and that now before us are not at all comparable. In *Braxton*, the court based its holding on the following crucial facts emphasized in the opinion:

> Plaintiff filed her complaint in the district court on September 18, 1985, the last day under the statutorily authorized limitations period. 28 U.S.C. § 2401(b). That same day, pursuant to the plaintiff's motion, Dennis Richman Services, Inc. was appointed to serve the summons and complaint.
>
> * * *
>
> [T]hree months after turning the papers over to the Richman organization, [counsel] became aware that service had not been made. At that point, approximately one month remained before the 120-day period would expire. As far as the record reveals, the lawyer accepted Richman's assurance that service would be completed in time and did nothing further to monitor

> the procedure. The district court was given no reason why Richman did not, or could not, carry out its assignment during the time remaining.
>
> The district court was confronted with a situation in which plaintiff's counsel knew that the process server was dilatory yet took no steps to insure that defendant would be timely served. . . .

817 F.2d at 239, 242. Thus, counsel in *Braxton* had reason to know that there was a significant danger of non-compliance with the deadline and simply ignored the risk. The *Braxton* court found that accepting such performance as good cause would be inconsistent with its obligation to insure that the "well-considered requirements of the rule" not be "disregarded with impunity." 817 F.2d at 241.[6]

As noted above, counsel's inadvertence in this case did not result from a lack of diligence, nor was counsel seeking to disregard Rule 4(a)(5)'s mandate with impunity. Unlike the attorney in *Braxton*, counsel in this matter made substantial good faith efforts to comply. Unlike *Braxton*, where counsel, despite knowledge that the process server was dilatory, took no action to insure that process would be timely served, counsel in this case did not willfully ignore his obligation under the rules, but rather fell victim to human error. For these reasons, the court's decision

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6. Similarly, Lovelace v. Acme Markets, Slip op. No. 86-1690 (3d Cir. May 29, 1987) is distinguishable from the case at hand. In *Lovelace*, counsel had reason to suspect that the process server would not meet the service deadline because of the absence of a return of service. Counsel's willingness to permit the 120-day period to lapse without requiring adequate proof of service reflected a lack of diligence in contravention of the well-considered requirements of Rule 4(j).

today is in no way precluded by its earlier ruling in *Braxton.*

IV.

The court's decision today does not require the absolution of any and all clerical errors committed by counsel as excusable neglect within the meaning of Rule 4(a)(5). The threshold requirement of establishing substantial good faith efforts to comply readily eliminates the most common errors from the excusable neglect analysis. This court has attempted to articulate certain factors to guide the excusable neglect determination recognizing that application of Rule 4(a)(5) requires careful case-by-case analysis. In exercising their discretion, district courts should weigh these factors carefully and rely on the facts of a particular case in order to find the neglect excusable or not.

We decline to hold that failure to proofread a caption must be deemed inexcusable in every case. In the factual context of this case, we hold that such a failure was excusable. Accordingly, the order denying defendant's motion under Rule 4(a)(5) will be reversed and the case will be remanded so that the district court may enter an order granting the motion for an extension of the time for appeal and approving *nunc pro tunc* the filing of the notice of appeal on December 24, 1986. We approved a similar procedure in *Torockio v. Chamberlain Mfg. Co.*, 456 F.2d 1084 (3d Cir. 1972). When this order has been entered

the stay in No. 87-5018 will be vacated and that appeal will proceed to a resolution on the merits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSOLIDATED FREIGHT-WAYS CORPORATION OF DELAWARE, a Delaware Corporation, Plaintiff	)	
	)	CIVIL NO. 84-0222
v.	)	
THOMAS D. LARSON, et al., Defendants	)	

MEMORANDUM and ORDER

(Filed February 4, 1987)

This Court entered judgment in this case on November 19, 1986. Any notice of appeal was due to be filed on or before December 19, 1986. On December 18, 1986, counsel for defendants, the state Attorney General's office, prepared a notice of appeal, together with a check for the appropriate fees. The Notice of Appeal was on a standard form and in the blank specifying the district court from which the appeal was being taken, defendants' counsel erroneously specified the District Court for the *Eastern* District of Pennsylvania in Philadelphia, Pennsylvania. The Notice of Appeal form was also erroneously sent to the Eastern District for filing, along with the check for the filing fees.

Upon receipt of the Notice of Appeal, the clerk for the Eastern District recognized counsel's error and forwarded the Notice to the Middle District. The Clerk of Court for the Middle District of Pennsylvania received the Notice on December 24, 1986, and filed it that same day.

Counsel for defendants remained unaware of the error until January 14, 1987, when counsel received word from the Court of Appeals that the appeal had not been timely filed. On that same day, counsel filed a motion in this court to extend the time within which to file the appeal for five days so that the Notice, filed on December 24, 1986, could be deemed timely filed. Plaintiff has objected to this motion, and the matter is now ripe for decision.

Counsel for defendants argues that the failure to timely file the notice of appeal was the result of excusable neglect within the meaning of Federal Rule of Appellate Procedure 4(a)(5). This Rule states, in pertinent part, "[t]he district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Defendants have filed their motion within 30 days of December 19, 1986, so the only issue we must address is whether the filing of the Notice in the wrong district court is excusable neglect.

Defendants cite the case of *Marshall v. Truland Corp.*, 24 Fed. R. Serv. 2d 1443 (4th Cir. 1978) to support their argument that an inadvertent misdirection of a notice of appeal is excusable neglect. Careful examination of this case reveals it is inapposite to the instant situation. In the *Marshall* case, the notice of appeal was correctly mailed by the Solicitor of Labor to the United States Attorney's Office in Alexandria, Virginia, in time to be filed. The Alexandria United States Attorney's Office then misdirected the notice of appeal. The *Marshall* court ruled that the district court did not abuse its discretion in granting

an extension because "[t]he responsible government officials had acted in a timely manner, but through *no fault of theirs,* the papers were inadvertently misdirected." *Id.* at 1444. Thus, in the *Marshall* case, the responsible counsel made no error at all; rather, the neglect was committed by a third party over whom the Solicitor of Labor had no control.

In the instant case, however, the neglect occurred within counsel for defendants' own office. Counsel did have, or should have had, control over and responsibility for the preparation of the Notice of Appeal and direction of it to the appropriate court. Two cases out of other Courts of Appeals indicate to us that failure to file the Notice in the appropriate court under such circumstances cannot be excusable neglect.

In *State of Oregon v. Champion International Corporation,* 680 F.2d 1300 (9th Cir. 1982), the State of Oregon attempted to appeal a final district court decision dismissing the state's complaint against defendant. Counsel for the state prepared and mailed a notice of appeal in time to file it before the deadline. Counsel inadvertently, however, addressed the envelope to a state court. The notice of appeal finally arrived at the district court only one day after the thirty-day time limit expired. The district court denied Oregon's timely motion for an extension of time, and the court of appeals affirmed, stating,

> [t]he standard for determining excusable neglect is "a 'strict' one." *Selph v. Council of Los Angeles,* 593 F.2d 881, 883 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed.R.Civ.P. 73, the predecessor of Fed.R.App.P. (4)(a)). It was intended to apply only to "extraordinary cases where

> injustice would otherwise result." *In re Estate of Butler's Tire & Battery Co.*, 592 F.2d 1028 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed.R.Civ.P. 73). Inadvertence or mistake of counsel does not constitute excusable neglect .... Extending the excusable neglect exception to clerical errors of counsel or counsel's staff would be inconsistent with the Advisory Committee's intent to limit the exception to extraordinary cases and would thwart the Rule's purpose of promoting finality of judgments.

Id. at 1301.

The first circuit, in distinguishing a case from the *Oregon* case, has also adopted the view that inadvertence or mistake of counsel does not constitute excusable neglect. In the case of *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir. 1986), counsel for appellant addressed a proper notice of appeal to the "United States District Court, Main Street, Springfield, Massachusetts 01103" and deposited it with the West Springfield Post Office a full five days before the expiration of the appeals deadline. The notice was not delivered by the post office until two days after the deadline had passed. The district court denied appellant's motion for an extension of time to file, "finding the case 'indistinguishable from *State of Oregon v. Champion International Corporation*, 680 F.2d 1300 (9th Cir. 1980 [1982]).'" The Court of Appeals for the First Circuit reversed, saying:

> With respect, we find a significant distinction. In *Oregon*, the notice was addressed to the state court, *the wrong court altogether*. This could scarcely be an excusable mistake. . . . Here the only conceivable "mistake" was to omit the number on Main Street. On the understanding that the District Court is a building

> distinctly marked, and obviously well known to the Springfield Post Office (and, indeed, only a shortish distance away) we do not consider this a mistake at all.

Id. at 301 (emphasis supplied).

In the instant case, counsel for the defendants certainly made a mistake, and that was addressing the Notice of Appeal to the "wrong court altogether." Unlike the *Scarpa* and the *Marshall* cases, the mistake in this case was made by defendants' counsel or someone under his control and supervision. Such an obvious mistake cannot be held to be excusable. Although we regret that such an important case to the parties, and to the people of this Commonwealth, will not, because of our ruling, receive appellate review on the merits, if the conduct in this case is held to be excusable, we are hard pressed to discern a principle that would delineate excusable neglect from inexcusable neglect, and the purposes of finality served by Federal Rule of Appellate Procedure 4(a) would be circumvented.

AND NOW, this 4th day of February, 1987, IT IS ORDERED that defendants' motion to extend the time within which to file a notice of appeal be and is hereby denied.

The Clerk of Court is directed to close the file.

/s/ R. Dixon Herman
R. DIXON HERMAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5122

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware corp.

Appellee

v.

LARSON, THOMAS D., Individually and in his capacity as Secretary of Trans., Dept. of Transp. Comm. of Penna.; COCHRAN, JAY JR., Individually and in his capacity as Commissioner of the Penna. State Police; ZIMMERMAN, LEROY S., individually and in his capacity as Attorney General of the Comm. of Penn.; THORNBURGH, RICHARD, Individually and in his capacity as Governor of the Comm. of Penna.,

Appellants

JUDGMENT

(Entered August 28, 1987)

Reversed, and the cause remanded to the said District Court with direction to enter an order granting a motion for extension of time for appeal and approving, nunc pro tunc, the filing of the notice of appeal on December 24, 1986. Costs taxed against appellees.

/s/ Sally Mrvos, Clerk